SUPREME COURT, U. S.
SEP 10 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

JOSEPH C. O'NEILL,
Respondent.

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions of the Courts Below

The opinion of the Circuit Court of Dade County, Florida (R. 20-32) was delivered on July 20, 1956 and is reported in 9 Fla. Supp. 153-164.

The opinion of the Supreme Court of Florida (R. 35-47) was delivered on January 22, 1958, and it is reported in 100 So. 2d 149-157.

Jurisdiction

The judgment of the Supreme Court of Florida which is before this Court for review is dated January 22, 1958, and it was entered on said date (R. 47).

A petition for rehearing was timely filed by the petitioner on February 4, 1958 (R. 48-51), and said judgment became final when said Court entered its order on February 24, 1958, denying said petition for rehearing (R. 51).

Said judgment struck down as unconstitutional Section 942.02, Florida Statutes 1955 (Appendix "A"), which is a part of the "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings." As appears from the opinion of said Court (R. 35-47) and the certificate of the Justices of said Court who participated in the decision of the case (R. 52), said Court held:

That said statute is unconstitutional because of conflict with the privileges and immunities clause of Section 2 of Article IV of the Constitution of the United States and with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, (1) insofar as said statute authorizes a judge of a court of record in Florida to order that a witness in Florida be taken into custody and delivered to an officer of a requesting state which has also enacted a similar reciprocal law, and (2) insofar as said statute authorizes a judge of a court of record in Florida to issue a summons to a witness in Florida requiring his attendance in the court of a requesting state which has also enacted a similar reciprocal law.

The petitioner duly filed its petition for certiorari in this Court within ninety days after the entry of said judgment, as required by Section 2101(c), Title 28, U. S. Code. Said petition was filed on April 21, 1958, which was within ninety days after the date when the judgment of the Supreme Court of Florida became final by virtue of the denial of the petitioner's petition for rehearing and was also within ninety days after the said judgment was originally entered. This Court granted certiorari on June 2, 1958.

It is believed by the petitioner that Section 1257(3), Title 28, U. S. Code, confers on this Court jurisdiction to review the said judgment by writ of certiorari.

Constitutional Provisions and Statutes Involved

The constitutional provisions which this case involves are the privileges and immunities clause of Section 2 of Article IV of the Constitution of the United States, reading as follows:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

and the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States, reading as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *"

The statute which this case involves is Section 942.02, Florida Statutes 1955, which, along with Sections 942.01 and 942.03-942.06, Florida Statutes 1955, make up the

"Uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings." Said statutes are found in Volume 2, Florida Statutes 1955, at pages 2927-2928. Since Section 942.02 is lengthy, it is not copied in this petition at this point but is set forth in the Appendix hereto. Also, in order that all of said uniform law may readily be examined by the Court, the other above mentioned Sections thereof are also copied into the Appendix (Appendix "A").

Questions Presented for Review

The questions presented for review are as follows:

Question One

Is Section 942.02, Florida Statutes 1955, being a part of the "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings," unconstitutional because of conflict with the privileges and immunities clause of Section 2 of Article IV of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, or with both of said privileges and immunities clauses, insofar as said statute authorizes a judge of a court of record in Florida to order that a witness in Florida be taken in custody and delivered to an officer of a requesting state for the purpose of procuring such witness' testimony in a criminal prosecution or grand jury investigation in a court of the requesting state, where such requesting state has also enacted a similar reciprocal law?

Question Two

Is Section 942.02, Florida Statutes 1955, being a part of the "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings," unconstitutional because of conflict with the privileges and immunities clause of Section 2 of Article IV of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, or with both of said privileges and immunities clauses, insofar as it authorizes the judge of a court of record in Florida to issue a summons to a witness in Florida directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation, where such requesting state has also enacted a similar reciprocal law?

Statement of the Case

In 1936 New York enacted the uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings and the same may be found as Section 618-a of the New York Code of Criminal Procedure.

In 1941, Florida adopted said uniform law and it later became Sections 942.01-942.06, Florida Statutes 1955, which are copied into the Appendix hereto (Appendix "A").

On April 23, 1956, there was filed in the Circuit Court of Dade County, Florida, a certificate executed pursuant to the requirements of said uniform law by Honorable Mitchell D. Schweitzer, one of the judges of the Court

of General Sessions, County of New York, State of New York (R. 1-5), seeking to require the attendance of the respondent, Joseph C. O'Neill, as a witness before a New York grand jury, the said respondent being a resident of the State of Illinois but being present in the State of Florida. Appended to said certificate was the affidavit upon which it was based, said affidavit having been executed by New York Assistant District Attorney Francis X. Clark (R. 6-9).

Said certificate recommended that the respondent be taken into immedaite custody and delivered to an officer of the State of New York to assure his attendance in New York (R. 3).

An attachment for the respondent, requiring his production before the Circuit Court to show cause, was issued on April 23, 1956 (R. 9-10). He was ordered released on bond (R. 10-11) and he made the required bond (R. 11).

On May 28, 1956, the respondent filed his response and motion to quash the rule to show cause (R. 13-18), wherein he raised the federal questions here sought to be reviewed as follows (R. 13-14):

> "FIRST: *That Chapter 942 Florida Statutes 1955, and particularly Sections 942.01 to 942.06 Florida Statutes,* entitled the 'Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings' *and each and every section thereof, separately and severally,* and Section 618-a, of the Code of Criminal Procedure of the State of New York, and each and every section thereof, *are unconstitutional, and null and void, because*: (Emphasis supplied.)
>
> • • •

> "(5) That each of said Acts, and each and every section thereof, separately and severally, is in contravention of and violates Article Four, Section 2, and the Fourteenth Amendment to the Constitution of the United States in that same abridges the privileges and immunities of Citizens of the United States, and deprives respondent of his liberty without due process of law and denies respondent the equal protection of the laws."

On July 20, 1956, after a hearing before the Circuit Court upon the pleadings, the Court rendered its opinion and order (9 Fla. Supp. 153-164; R. 20-32) in which it passed upon the respondent's above-quoted contention by holding Section 942.02 to be violative of the Fourteenth Amendment to the United States Constitution in that it abridges the privileges and immunities of citizens of the several states by impairing their right of free ingress and egress from state to state, as appears from the following quotation from the Court's opinion and order (R. 26):

> "Passing for the moment, the fact that the Legislature of this State is powerless to confer upon this, or any other Court of the State of Florida, jurisdiction to issue process running beyond the limits of the State, Section 942.02 Fla. Statutes 1955 also violates the Fourteenth Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the several states, since it impairs the right of free ingress and egress from state to state, which is one of the rights of national citizenship guaranteed by the Fourteenth Amendment to the Constitution of the United States. Edwards v. California, 314 US 160, 62 S. Ct. 164; In Re Allen, supra; Commonwealth v. Klaus, supra, and Commonwealth v. Pennsylvania, supra."

The Court sustained the respondent's motion to quash and discharge the rule to show cause in the following language (R. 30-31):

"Upon consideration of the application of the People of The State of New York, the Court is of the opinion that said Application should be denied, and this proceeding dismissed, and therefore, it is

"CONSIDERED, ORDERED, AND ADJUDGED, as follows:

"1. That the Motion of JOSEPH O'NEILL to quash and discharge the Rule to Show Cause issued in the above-styled cause, and directed to him, be and the same is hereby granted, and said Rule to Show Cause is hereby quashed and discharged, and said JOSEPH O'NEILL is hereby discharged from custody thereunder."

In its opinion and order, the Circuit Court also held Section 942.02, Florida Statutes 1955, to be unconstitutional upon the grounds that it attempted to give the courts of Florida jurisdiction to issue process having extra-territorial operation, and that it unconstitutionally permitted a witness to be taken into custody and delivered to an officer of the requesting state without allowing such witness to make bail. The Court further held that the certificate and affidavit did not state sufficient facts to show that the respondent was a material and necessary witness.

On August 15, 1956, the petitioner filed its notice of appeal from said order to the Supreme Court of Florida (R. 32) and thereafter duly perfected its appeal to the Supreme Court.

The petitioner duly raised the federal questions here sought to be reviewed in its assignments of error numbered 1, 2, 3 and 4, reading as follows (R. 33):

"1. That the Court erred in granting the Motion to Quash the Rule to Show Cause in these proceedings.

"2. That the Court erred in its ruling that Chapter 942.02, Florida Statutes 1955, is unconstitutional.

"3. That the Court erred in its ruling that subsection 1 of Chapter 942.02, Florida Statutes 1955, is unconstitutional, void, and of no effect insofar as the portion of this statute which confers jurisdiction upon any court of record in the State of Florida to make an order directing a witness to appear before a court in another State.

"4. That the Court erred in its ruling that subsection 1 of Chapter 942.02 Florida Statutes 1955 violates the 14th Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the several states."

On January 22, 1958, the Supreme Court of Florida handed down its opinion (100 So. 2d 149-157; R. 35-47) and its judgment (R. 47) affirming the order appealed from. The opinion answered the federal questions here involved by holding that Section 942.02 unconstitutionally conflicts with the privileges and immunities clauses of Section 2 of Article IV and the Fourteenth Amendment to the United States Constitution, (1) insofar as it permits a witness to be taken into custody and delivered to an officer of the requesting state, and (2) insofar as it authorizes the issuance of a summons requiring a witness to attend and testify in a criminal matter in the courts of another state. [*In this connection, see the certificate of the Justices of the Supreme Court of Florida who participated in the decision* (R. 52), *which certificate clearly shows that the holding of unconstitutionality has reference to the privileges and immunities clauses of Section 2 of Article IV and the Fourteenth Amendment to the United States Constitution.*]

The opinion did not pass upon the question of whether the statute is unconstitutional as attempting to confer upon the Courts of Florida jurisdiction to issue process operating extra-territorially.

The Court specifically declined to pass upon the question of whether the statute is unconstitutional because it does not provide for bail for persons attached and delivered into custody of an officer of another state.

Finally, the opinion specifically rejected the Circuit Court's holding that the certificate of the judge of the requesting state did not state sufficient facts to show that the respondent was a material and necessary witness.

Summary of Argument

The privilege or immunity involved is the right of free inter-state ingress and egress. This right is not unconstitutionally infringed either by the provision of the Florida statute authorizing the bodily delivery of a witness to a requesting state having a similar reciprocal law or by the provision authorizing the issuance of a summons requiring his attendance in a requesting state.

These provisions are necessary for two purposes, viz:

1. In order that Florida may protect its citizens and provide for its internal security and the safety and good order of society.

2. In order that, through the exercise of comity, Florida may assist other states having similar statutory provisions to do the same things for themselves and their citizens.

It is just as important for a state to have necessary witnesses at grand jury investigations and criminal trials as it is to have custody of defendants charged with crimes. It is of no help to a state to acquire custody of a defendant by arresting him within its own bounds or by extraditing him from another state unless it can procure the necessary witnesses to testify against him.

Not only does the public interest require that a state have some means whereby necessary witnesses in other states may be summoned to appear in criminal proceedings in its courts but it also requires that a state have a way to assure the attendance of a necessary out-of-state witness by having him taken into custody and brought before its court. In many instances, witnesses are reluctant and would disobey subpoenas directing them to attend court in another state, preferring to either face contempt proceedings for their disobedience or to leave the state and avoid punishment as well as giving the testimony sought of them. This is especially true when the witnesses are associated with organized crime, which will go to any lengths to defeat the investigation and prosecution of crimes committeed by its agents.

In virtually all the states, the confrontation rule, often implemented by a constitutional provision, makes it impossible to try a defendant without producing in open court the witnesses against him. In many states, depositions cannot even be used in grand jury investigations. These factors emphasize the need for procuring the personal presence of witnesses. The Congress has enacted no legislation to enable the states to procure necessary witnesses from each other and the only way it can be done is by means of the uniform law here under review, which has been adopted by forty-two states and Puerto Rico.

Florida protects its own internal security when it furnishes witnesses to other states under the uniform law, since it thereby places itself in position to obtain the reciprocal benefits of the law by procuring necessary witnesses from other states. Other states will not aid Florida unless Florida aids them.

The right of free ingress and egress is not absolute. It may be interfered with by a state for the purpose of preserving its internal security and protecting its citizens and the safety and good order of society, and for the purpose of extending comity to its sister states in order to help them to do the same things for themselves and their citizens.

For these purposes a state has the reserved sovereign power to interfere with the right of free ingress and egress. This right is lawfully interfered with every day in a multitude of ways, without violating the constitutional provisions securing the right.

A state has the power to enact legislation authorizing the surrender to another state of a person charged with crime in the latter state even though such person is not a fugitive subject to extradition under the federal extradition statute. By the same token, a state has the power to enact legislation authorizing the bodily surrender of a necessary witness to another state and authorizing the summoning of such a witness to attend court in another state, since procuring necessary witnesses is as vital to criminal investigations and prosecutions as is procuring custody of the defendants for trial.

The uniform law under review is a valid exercise of Florida's reserved sovereign power to defend itself against crime and to exercise comity towards other states by assisting them to defend themselves against crime.

ARGUMENT

I

The provision of Section 942.02, Florida Statutes 1955, which authorizes a judge of a Florida court of record to order that a witness in Florida be taken into custody and delivered to an officer of a requesting state for the purpose of assuring such witness' attendance at a criminal proceeding or grand jury investigation in such requesting state, where the requesting state has enacted similar reciprocal legislation, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the United States Constitution or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution.

A. The Florida Statutory Provisions Involved

The statutory provision here involved is Subsection 3 of Section 942.02, Florida Statutes 1955 (Appendix "A"), which provides that if the certificate (meaning the certificate of the judge of the requesting state) recommends that the witness be taken into custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, and the judge (meaning the Florida judge) at the hearing, being satisfied of the desirability of such custody and delivery, may, in lieu of issuing subpoena or summons, order that the witness be forthwith taken in custody and delivered to an officer of the requesting state.

This provision is to be considered in the light of the fact that Subsection 1 of Section 942.02 (Appendix "A") requires that the certificate be made by a judge of a court

of record in a state which by its laws has made provision for commanding persons within that state to attend and testify in Florida, and in the light of Section 942.05, Florida Statutes 1955 (Appendix "A"), which provides that the entire chapter which includes Section 942.02 shall be applicable only to states which shall enact reciprocal powers to Florida relative to the securing attendance of witnesses.

B. The Privilege or Immunity Involved: The Right of Free Ingress and Egress

The Supreme Court of Florida held that the provisions of Subsection 3 of said Section 942.02 violate the privileges and immunities clauses of Article IV, Section 2, and the Fourteenth Amendment by depriving a person of the right of free ingress and egress, the right to pass freely from state to state (R. 41-46, 52). Thus, the only constitutional privilege or immunity which is here involved is the right of free ingress and egress.

This Court has held that the privileges and immunities clause of Article IV, Section 2, of the United States Constitution guarantees to the citizens of each state the right of free ingress into other states, and free egress from them. *Paul* v. *Virginia*, 8 Wall. 168. However, the Court has also said that the *sole purpose* of the privileges and immunities clause of Article IV, Section 2, was to declare to the several states that whatever the rights called privileges and immunities of citizens of the states, "as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction." *Slaughter-House Cases*, 16 Wall. 36, 75-77. In other words, the privileges

and immunities clause was *intended to prevent discrimination* by the several states against citizens of other states in respect to the fundamental privileges of citizenship. *Maxwell v. Bugbee,* 250 U. S. 525, 537.

Section 942.02, Florida Statutes 1955, does not discriminate between citizens of Florida and those of other states found within its borders, but applies to all alike.

This Court has said that among the rights and privileges of national citizenship (the type of citizenship dealt with in the Fourteenth Amendment) is the right to pass freely from state to state. *Twining* v. *New Jersey,* 211 U. S. 78, 97.

C. The right of free ingress and egress is not absolute. It may be interfered with by a state in order to protect its citizens and provide for its internal security and the safety and good order of society, and in order to assist sister states to do the same things for themselves and their citizens as a matter of comity. The challenged Floirda statutory provision is necessary for the accomplishment of these objectives.

1. Said statutory provision is necessary for the purpose of protecting Florida's citizens and providing for its internal security and the safety and good order of society, and for the purpose of assisting sister states to do the same things for themselves and their citizens.

It is apparent that the purpose of the Florida provision is to authorize the delivery of a witness to an officer of a requesting state which has a similar reciprocal law where the circumstances are such as to require delivery

in order to assure the presence of the witness in the requesting state. At times there is no other way to cause a witness to appear and testify in the requesting state except to take him into custody and bodily transport him to that state. It is well known that some witnesses would not hesitate to disobey a summons in order to avoid giving testimony in another state. A nonresident of Florida, and the respondent is a nonresident, could, if merely summoned, depart for his home state (in this case Illinois, which does not have a similar reciprocal provision) and leave the Florida court impotent to require his attendance in a requesting state which has adopted a similar reciprocal law, and also leave the Florida court unable to punish him for failing to obey the summons. Moreover, a witness residing in Florida could flout a summons requiring his attendance in a requesting state and avoid appearing there by either absconding from Florida or remaining within its bounds and suffering contempt penalties imposed by the court issuing the summons.

It is of no help to a state to acquire custody of a defendant by arresting him within its own borders or by extraditing him from another state and at the same time say to that state that it is completely powerless to procure vitally necessary witnesses against him from another state even though the latter is willing, as a matter of comity, to use the processes of its courts to require such witnesses to attend court in the requesting state where the criminal proceeding is pending. Obtaining custody of a defendant is an empty victory if the state cannot obtain the witnesses with which to prosecute him.

If it should be held that the states have no right to exchange witnesses in criminal proceedings under the pro-

vision of the uniform law here under consideration, organized crime would not hesitate to avail itself of the hiatus in the law by sending essential witnesses across state lines in full awareness that no conviction could ever be obtained without procuring the personal presence of such witnesses in the state wherein the criminal proceedings are pending. The only way to assure the presence of a witness who has been sent across state lines by organized crime for the purpose of preventing him from testifying is to take him into custody and deliver him to an officer of the state from which he fled; if such a witness were merely summoned, he could, and probably would, disregard the summons and flee to still another state.

In most states a person accused of crime has the right to confront the witnesses against him face to face. It is a common law right. *23 C. J. S. 360, Criminal Law, Section 999.* It is secured by the Constitutions of all except a small number of the states, while in some of the other jurisdictions the right is purely statutory. *14 Am. Jur. 890-891, Criminal Law, Section 178.* It is therefore not legally possible in most states for the prosecution to use the deposition of an absent witness against the accused at his trial. Further, the law of many states does not permit the prosecution to use depositions in preliminary proceedings such as grand jury investigations. Even if all the states permitted the use of depositions in grand jury investigations of crime, that would do no more than enable the procurement of indictments; it would be of no avail in trials of the defendants for the offenses charged. In view of the practically universal confrontation rule, the states must have available some such method of exercising comity between themselves as is provided by the said uniform law if they are to be able to preserve their internal security against criminals.

Florida protects its own internal security and protects its own citizens against crime when it takes a witness into custody and delivers him to an officer of a requesting state which has a similar reciprocal law. By doing so, it places itself in position to obtain the reciprocal benefits of the law by securing from other states witnesses essential to the investigation and prosecution of crime in Florida. Other states will not aid Florida to obtain witnesses unless Florida aids them.

Moreover the provision is necessary in order that Florida may assist its sister states which have adopted similar statutes. Comity, concord and harmony between the states requires Florida to render to other states the assistance authorized by its provision when they are willing and ready to render like assistance to Florida.

2. The right of free ingress and egress is not absolute. It may be interfered with by a state in order to protect its citizens and provide for its internal security and the safety and good order of society, and in order to assist sister states to do the same for themselves and their citizens as a matter of comity.

As this Court said in *Toomer* v. *Witsell*, 334 U. S. 385, 396, in considering the privileges and immunities clause of Article IV, Section 2,

> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute."

In *Coppage* v. *Kansas*, 236 U. S. 1, 18-19, after citing its previous decisions, this Court said:

> "An evident and controlling distinction is this: that in those cases it has been held permissible for the

states to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; * * *"

* * *

"But, in our opinion, the Fourteenth Amendment debars the states from striking down personal liberty or property rights or materially restricting their normal exercise, *excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare.*" (Emphasis supplied.)

The police power, which is a reserved sovereign power of the state, entitles it to interfere with a citizen's right of free ingress and egress when it becomes necessary in order to promote the internal security, good order and the welfare of the state.

As this Court said in *Panhandle Eastern Pipe Line Company* v. *State Highway Commission of Kansas*, 294 U. S. 613, 622, the police power of a state springs from its obligation to protect its citizens and provide for the safety and good order of society; it is the governmental power of self-protection and it permits reasonable regulation of rights in particulars essential to the preservation of the community from injury.

The police power was reserved to the states at the time the original Constitution was adopted and the Fourteenth Amendment was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens and to promote their health, morals, education and good order. *Giozza* v. *Tiernan*, 148 U. S. 657, 662.

The police power is one of the least limitable of governmental powers. *Queenside Hills Realty Co., Inc.* v. *Saxl*, 328 U. S. 80, 83.

Freedom of ingress and egress is lawfully restricted every day in the interest of society. By charging a man with a crime and placing him in jail the state restricts his free ingress and egress. By convicting him and placing him in prison the state restricts his free ingress and egress. By subpoenaing a man to court for the purpose of testifying in a criminal case a state restricts his free ingress and egress for the time required to attend court. By placing a witness in jail in order to insure his attendance at the trial of a criminal case, the state restricts his free ingress and egress. By placing a man in quarantine because of a contagious, communicable disease, a state restricts his free ingress and egress. In these and many other instances, a man's freedom of ingress and egress is constitutionally restricted by the states in the exercise of their reserved sovereign powers notwithstanding the constitutional guaranties for the protection of the privileges and immunities of citizens of the several states and of the United States.

Florida's primary purpose in enacting the uniform law here under consideration was not to assist other states by furnishing them witnesses. Rather, it was to enable Florida to procure witnesses from other states in the interest of its own public necessity and self-preservation. In order to procure witnesses from other states it was necessary that Florida reciprocate by making witnesses available to other states. Since Florida must have witnesses from other states in order to prosecute criminal conduct and protect its internal safety, it was just as much an exercise of its reserved sovereign police power to en-

act the provision in issue as it would have been for it to enact a statute providing for taking a witness into custody within the State of Florida when necessary to insure that witness' attendance before a Florida grand jury or at the trial of a criminal case.

Moreover the statute was enacted by Florida as an act of comity to its sister states, to assist them in obtaining witnesses to enforce their own criminal laws. It would be valid on that basis even if Florida had not primarily served her own interests by enacting it.

That the several states have the sovereign power to provide for the internal safety of each of them, and to promote concord and harmony among all of them by mutually supporting each other in bringing offenders to justice, was dealt with by this Court in *Kentucky* v. *Dennison*, 24 How. 66, 101-102, in words as follows:

> *"Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American Colonies;*
>
> • • •
>
> *"And when these Colonies were about to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members; and it is introduced in the Constitution substantially in the same words,* but substituting the word 'crime' for the words 'high misdemeanor,' and thereby showing the deliberate purpose to include every offense known to the law of the State from which the party charged had fled.

"The argument on behalf of the Governor of Ohio, which insists upon excluding from this clause new offenses created by a statute of the State, and growing out of its local institutions, and which are not admitted to be offenses in the State where the fugitive is found, nor so regarded by the general usage or civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding State would probably draw one line, and the Governor of the other State another. And if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. *It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never failing subject of dispute and ill will.*" (Emphasis supplied.)

While it is true that the above-quoted statements dealt with persons charged with crime, it necessarily follows that, since there is no federal constitutional or statutory provision to enable states to obtain witnesses from each other, the states have the reserved sovereign power to provide for their internal safety and to promote concord and harmony among themselves by mutually supporting each other in procuring the attendance of witnesses from each other in criminal matters just as much as they would have had the unrestricted sovereign power to enact legislation on all aspects of interstate extradition except for the extradition clause in Article IV, Section 2, of the United States Constitution.

It is to be noted from the foregoing quotation from *Kentucky* v. *Dennison* that, even in the absence of an

enabling provision of the United States Constitution, the states would have had the power to extradite persons charged with crime from one state to the other, in the exercise of comity. Here, there is no federal constitutional provision or statute on the subject of the states obtaining witnesses from other states and the states have the power to enact appropriate legislation as an act of comity to their sister states.

This Court has expressly recognized that a fugitive from justice may be extradited solely under the authority of a state statute even when the governing federal statute does not authorize the extradition. *Ex parte Innes* (Texas), 173 S. W. 291, involved a woman fugitive from Georgia who had fled to Oregon, whence she was extradited to Texas. She was not subject to extradition from Texas to Georgia under the authority of the federal extradition statute because she had not fled to Texas. The Texas court held that she could be extradited to Georgia under authority of an enabling Texas statute. This Court affirmed in *Innes* v. *Tobin*, 240 U. S. 127, and upheld the power of a state to provide by statute for the surrender of fugitives not covered by the federal extradition statute. The reasoning was (pages 134-135) that by the omission of Congress to extend the federal statute to the full limits of constitutional power "it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them—state authority until it was deemed essential by further legislation to govern them exclusively by national authority."

Since the power of the state to prosecute criminals and to preserve its internal security against them is in many instances utterly dependent upon procuring necessary wit-

nesses from other states, and since the Congress has not legislated on the subject, we submit that the several states have just as much sovereign power to enact reciprocal legislation under which witnesses in criminal proceedings may be procured from each other as Texas had to enact legislation providing for the surrender of persons charged with crime who could not be extradited under federal law. The privileges and immunities clauses of the Federal Constitution are no more violated by the Florida statutory provision here under consideration than they were violated by the Texas statute considered in the *Innes* cases, *supra.*

The provision of Article IV, Section 2, United States Constitution, which deals with the extradition of fugitives does not authorize Congress to enact, and Congress has not enacted, a statute authorizing the extradition of a person charged with crime who is not a fugitive because he was not present in the charging state when he committed the act resulting in a crime in that state. Nevertheless, forty states (listed in *Uniform Laws Annotated,* 1957 Edition, Vol. 9, page 258) and Hawaii have enacted the Uniform Criminal Extradition Act, Section 6 of which provides for the extradition of persons not present in the demanding state at the time of the commission of the crime charged against them in that state (same volume, p. 297). That provision has been upheld as within the power of the states to enact. *Ennist* v. *Baden* (Fla.), 28 So. 2d 160; *Culbertson* v. *Sweeney* (Ohio), 44 N. E. 2d 807, 45 N. E. 2d 118; *English* v. *Matowitz* (Ohio), 72 N. E. 2d 898; *Lindley* v. *Crider* (Ark.), 265 S. W. 2d 498; *Ex parte Morgan,* (Cal.), 194 P. 2d 800; *People ex rel. Faulds* v. *Herberich* (N. Y.), 93 N. Y. S. 2d 272, affirmed 93 N. E. 2d 913; *State* v. *Kriss* (Md.), 62 A. 2d 568; *Cassis* v. *Fair* (W. Va.), 29 S. E. 2d 245; *Ex parte Dalton* (N. M.), 244 P. 2d 790; *Ex parte Bledsoe* (Okla.), 227 P. 2d 680.

Such a provision may be enacted by virtue of a state's reserved sovereign power and as an act of comity to a sister state, as appears from the following quotation from *22 Am. Jur. 250*, Extradition, Section 9:

> "A state may also, in the exercise of its reserved sovereign powers and as an act of comity to a sister state, provide by statute for the surrender, on requisition, of persons who are indictable for a crime committed through their constructive presence in such sister state, even though they have never been corporally within such state and have never fled therefrom to escape arrest and punishment, since, in the absence of such statute, such persons are not subject to extradition by the latter state."

Along the same lines is Section 5 of the Uniform Reciprocal Enforcement of Support Act (*Uniform Laws Annotated*, 1957 Edition, Volume 9C, page 23), which provides for the surrender in extradition proceedings of a person charged with the crime of failing to provide for the support of his dependents and which specifies that such surrender shall be made although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. This act has been adopted by almost all the states (*Uniform Laws Annotated*, 1957 Edition, Volume 9C, pages 1 and 2). Despite the fact that said Section 5 authorizes the surrender of a nonfugitive, it has been upheld as an exercise of the state's reserved sovereign powers and as an act of comity to a sister state. *State* v. *Bennett* (Fla.), 90 So. 2d 43; *Harrison* v. *State* (Ala.), 77 So. 2d 384, 77 So. 2d 387; *Ex parte Coleman* (Tex.), 245 S. W. 2d 712.

It is clear that in the exercise of its reserved sovereign power, and as an act of comity to a sister state, a state

may aid a sister state by bodily surrendering a person charged with crime even though no federal law authorizes the surrender and even though the surrender is of no immediate benefit to the surrendering state or its inhabitants. Therefore, we submit that a state also has the reserved sovereign power to exercise comity to other states by bodily surrendering to them necessary witnesses, without which crime may not be investigated or prosecuted; and that this is so even though the surrendering state obtains no immediate benefit from the surrender; the benefit to it accrues from the reciprocal operation of the statutes of the states involved.

II

The provision of Section 942.02, Florida Statutes 1955, which authorizes a judge of a Florida court of record to issue a summons to a witness in Florida directing him to attend and testify in a criminal proceeding in a requesting state which has adopted similar reciprocal legislation, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the United States Constitution or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution.

Subsections 1 and 2 of Section 942.02, Florida Statutes 1955, are the statutory provisions with which this point is concerned. They authorize the judge of a court of record in Florida to issue a summons to a witness in Florida directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation (Appendix "A").

Subsection 1 requires that the certificate be executed by a judge of a court of record of a state which by its laws has made provision for commanding persons within that state to attend and testify in Florida; also, Section 942.05 makes the entire uniform law reciprocal in operation (Appendix "A").

We think that the arguments found in the foregoing part of this brief are equally applicable to the point here involved and we here rely upon them to sustain our contention that Florida has the right and power to enact a reciprocal law authorizing the issuance of a summons to a witness in Florida, directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation, where such requesting state has also enacted a similar reciprocal law.

Conclusion

The petitioner believes itself entitled to the following relief:

1. That this Court will hold that Section 942.02, Florida Statutes 1955, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, insofar as said statute authorizes the judge of a court of record in Florida to order that a witness in Florida be taken into custody and delivered to an officer of a requesting state for the purpose of assuring such witness' attendance at a criminal prosecution or grand jury investigation in a court of such requesting state, when such requesting state has also enacted a similar reciprocal law.

2. That this Court will hold that Section 942.02, Florida Statutes 1955, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, insofar as it authorizes the judge of a court of record in Florida to issue a summons to a witness in Florida, directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation, when such requesting state has also enacted a similar reciprocal law.

3. That this Court will reverse the judgment of the Supreme Court of Florida which is here under review and remand the cause to said Court for further proceedings.

Respectfully submitted,

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APPENDIX "A"

Sections 942.01 Through 942.06, Florida Statutes 1955

942.01 *Definitions.*—"Witness"—as used in this chapter shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding held by the prosecution or the defense.

The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

942.02 *Summoning witness in this state to testify in another state.*—

(1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken in custody and delivered to an officer of the requesting state.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day,

that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

942.03 *Witness from another state summoned to testify in this state.*—

(1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming

into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

942.04 *Exemption from arrest and service of process.*—

(1) If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(2) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

942.05 *Uniformity of interpretation.* — This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and shall be only applicable to such state as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as herein provided.

942.06 *Short title.*—This chapter may be cited as "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings."